

FEDERAL CIRCUIT COURT OF AUSTRALIA

*PROMSOPA v MINISTER FOR IMMIGRATION
& ANOR*

[2020] FCCA 546

Catchwords:

MIGRATION – review of AAT decision – cancellation of Spousal Visa – whereby the Applicant had a child – where the visa spouse is not a biological parent of the child conceived – where the Applicant failed to notify the Department of a change in circumstance – whether decision affected by jurisdictional error – jurisdictional error not established – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.104, 107, 375A, 359
Migration Regulations 1994, Reg.2.41

Applicant:	NONGYAO PROMSOPA
First Respondent:	MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	PEG 50 of 2019
Judgment of:	Judge Vasta
Hearing date:	10 February 2020
Date of Last Submission:	10 February 2020
Delivered at:	Perth
Delivered on:	11 February 2020

REPRESENTATION

Counsel for the Applicant:	Ms C. Taggart
Solicitors for the Applicant:	Estrin Saul Lawyers
Counsel for the First Respondent:	Mr R. Macliver
Solicitors for the First Respondent:	Australian Government Solicitor

ORDERS

- (1) That the Applications filed 6 February 2019 and amended on 8 January 2020 are dismissed.
- (2) That the Applicant pay the costs of the First Respondent fixed in the sum of \$7,467.00.

IT IS NOTED:

- (A) That the Court will not provide a written version of the reasons for judgment delivered today, unless an appeal has been lodged and the Court has received a request in writing from either party seeking that written reasons be produced.
- (3)
- (4)
- (5)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT PERTH

PEG 50 of 2019

NONGYAO PROMSOPA

Applicant

And

**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS**

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

(Ex Tempore)

1. On 7 January 2019, the Administrative Appeals Tribunal (“the AAT”) affirmed the decision to cancel the Spouse Visa of the Applicant, Nongyao Promsopa. On 6 February 2019, the Applicant asked this Court to review that decision.
2. The background to the matter is this. The Applicant is from Thailand. She met her sponsor, Mark Potter, in Phuket in March 2011. She travelled to Australia on 7 September 2011 on a Tourist Visa and stayed with Mr Potter for about three months, returning to Thailand in December 2011.

3. Mr Potter and the Applicant were married in Bangkok on 12 September 2012. On 4 December 2012, the Applicant applied for a Partner Visa sponsored by Mr Potter. The provisional visa was granted on 22 April 2013.
4. On 9 December 2014, the Applicant applied for a Spousal Visa. In that application, the Applicant submitted a form in which she provided the following details: that she was in a genuine and continuing relationship with Mark Potter, and, that she and Mr Potter have a mutual commitment to a shared life as husband and wife to the exclusion of all others.
5. The Applicant signed a declaration that she would inform the Department, in writing, if she became aware of any changes in circumstances or any change relating to the information she provided in, or with, the application, whilst being considered. The visa was granted on 10 March 2015.
6. On 29 October 2015, Nayada Skye Walker was born. The birth certificate identifies that the Applicant is this child's mother. However, the father is not Mark Potter, but is a person called Chris Douglas Walker. Mr Walker is a citizen of the United Kingdom.
7. Simple mathematics calculates that the child was conceived in January/February 2015. Obviously, this means that the Applicant and Mr Potter could not have had a mutual commitment to a shared life as husband and wife to the exclusion of all others at the time that this child was conceived. It follows that the Applicant did not inform the Department of this change relating to the information that she had provided in her application for a visa.
8. On 28 June 2018, the Applicant was issued with a notice of intention to consider cancellation because the Delegate had formed the view that the Applicant did not comply with s.104 of the *Migration Act 1958* ("the Act"). That section relates to the need to inform the department of changes made in any information that is given to the department.
9. Section 104 of the Act reads as follows:

Changes in circumstances to be notified

(1) If circumstances change so that an answer to a question in a non-citizen's application form or an answer under this section is incorrect in the new circumstances, he or she must, as soon as practicable, inform an officer in writing of the new circumstances and of the correct answer in them.

10. There was a notice pursuant to s.107 of the Act that was sent to the Applicant. The Applicant did not comply and give information in relation to that notice. There is no doubt that the notice sent to the Applicant complied with s.107 of the Act. The Applicant did not reply to the notice. There is no doubt also that the Applicant did not comply with s.104 of the Act, in that she failed to notify the Department of those change of circumstances.
11. The Applicant said that she and Mr Potter started to have problems at the end of 2014, but they were not formally separated. She said that she travelled to Thailand after returning to Australia and stayed with her relatives, but visited Mr Potter. She said they were trying to work on the relationship and what the future held for them.
12. The Applicant said she met Mr Walker at the end of January 2015 and in February found out that she was pregnant. She said that she was surprised but happy, but also upset that her relationship with Mr Potter was now over. She said she told Mr Potter in March 2015 and they talked about the fact that the relationship was now over.
13. The Applicant said that problems soon started with Mr Walker and they made a decision to leave the child in Thailand when they were visiting there in 2016. The Applicant said that her relationship with Mr Walker ended in October 2016. She said that she then travelled to Thailand to get her child.
14. She said that she wanted to travel more with the child, but that Mr Walker started legal proceedings to prevent her from doing that. The Applicant gave the Tribunal a number of documents that she had filed in the legal proceedings. The Applicant and Mr Walker agreed to final parenting orders in August 2018. I note that this was after the Applicant's visa had been cancelled.
15. The Tribunal assessed whether the Applicant's visa should be cancelled. In doing so, the Tribunal had regard to the prescribed

circumstances which are set out in Reg.2.41 of the *Migration Regulations* 1994 (“the Regulations”). These circumstances are as follows:

- (a) the correct information;*
- (b) the content of the genuine document, if any;*
- (c) whether the decision to grant a visa or immigration are clear the visa holder was based, wholly or partly, on incorrect information or a bogus document;*
- (d) the circumstances in which the non-compliance occurred;*
- (e) the present circumstances of the visa holder;*
- (f) the subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act;*
- (g) any other instances of non-compliance by the visa holder known to the Minister;*
- (h) the time that has elapsed since the non-compliance;*
- (j) any breaches of the law since the non-compliance and the seriousness of those breaches;*
- (k) any contribution made by the holder to the community.*

16. In the reasons of the Tribunal, the Tribunal has set out those circumstances and what the Applicant’s comments were in relation to the circumstances and what conclusion, if any, the Tribunal has reached in relation to those circumstances.

17. After considering those circumstances, the Tribunal said they may also have regard to lawful government policy and considered the following circumstances, found at page 181 of the Court Book:

...

- *whether there are mandatory legal consequences, such as where the cancellation would result in the visa holder being unlawful and subject to detention, or whether indefinite detention is a possible consequence for cancellation, or whether there are provisions in the Act*

which prevent the person from making the valid visa application without the Minister's intervention

- *whether there would be consequential cancellations under s. 140*
- *whether any international obligations will be breached as a result of the cancellation, such as non-refoulement obligations, family unity principles or the obligation to consider the best interests of the child*
- *any other relevant matters, including the degree of hardship that may be caused to the visa holder and any family members.*

18. The Tribunal noted that it considered the best interests of the child and acknowledged that that was a primary consideration. The Tribunal said that it accepted that the interests of the child may be to have the presence of both parents in the same country. The Tribunal acknowledged the present family law orders.

19. At paragraph 43 of their reasons the Tribunal said this:

However, the Tribunal places weight on the fact that the child's father is not a permanent resident of Australia. While the applicant claims that Mr Walker intends to apply for a permanent visa, the Tribunal finds the applicant's evidence to be speculative and there is no evidence before the Tribunal to indicate that the application for permanent residence has been made, or that Mr Walker has been granted a permanent visa. It cannot be assumed that he will be granted such a visa in the future. That is, even if the cancellation is set aside, there is no guarantee that the child will be able to stay in Australia in the presence of both parents. If the cancellation is set aside and the applicant can remain in Australia, there is no guarantee that the child's father will remain in Australia. If the visa is cancelled, the applicant's daughter can remain in Australia as an Australian citizen, or she may travel to Thailand with the applicant or to the UK with her father. The applicant has not satisfied the Tribunal that the reinstatement of her visa would offer the only opportunity for the child to have the benefit of both parents in the same country. While the Tribunal acknowledges that there are Family Court orders in relation to the child, the Tribunal is mindful that such orders will only apply while the child's parents reside in Australia. Should Mr Walker not obtain - or choose not to pursue - an Australian permanent

visa, the family would need to make other arrangements to enable the child to spend time with both parents.

20. At paragraphs 44 and 45 the Tribunal said this:

44. As for the child having a better environment, education, healthcare and other benefits in Australia the Tribunal is not satisfied that the same benefits would not be available to her in Thailand. The applicant's claims that Australia has better systems are generalised and the applicant has not satisfied the Tribunal that her daughter would be denied access to adequate services in Thailand.

45. The Tribunal has formed the view that the cancellation of the visa would not adversely affect the child's best interests because the child's father does not have a right to reside in Australia permanently and the family would need to make arrangements to enable both parents to have access to the child.

21. At paragraph 46 the Tribunal said this:

The applicant has not raised any other matters for consideration.

22. The Tribunal then summarised its position and said that it formed the view that the best interests of the child would not be adversely affected by the cancellation. Significantly, the Tribunal then said that if they were wrong in this assessment, that the failure to inform the Department, about changes in her circumstances, was so significant that, in effect, it would outweigh the other matters; so, those considerations would still mean that they would conclude that the visa should be cancelled.

23. The Tribunal then affirmed the decision to cancel the Applicant's visa.

24. There are three grounds raised in the amended application. Ground 1 is as follows:

*1. The Administrative Appeals Tribunal's (**Tribunal**) failure to provide the information and documents described in the purported certificate dated 31 August 2018 (**Information**) was a denial of procedural fairness amounting to jurisdictional error.*

25. The background to this ground is that the Tribunal told the Applicant that it had issued a certificate pursuant to s.375A of the Act. The certificate was given to the Applicant before the hearing and she was

invited to make any submission as to the validity of the certificate. The Applicant did not make any submission relating to its validity.

26. It seems difficult to understand how one can now allege that there has been a breach of procedural fairness when one is given a copy of the certificate and asked to make submissions on it, but then declined to do so.

27. The basis upon which it is now claimed that the certificate is invalid is that the wording on the certificate does not contain the statement required by s.375A(2)(b) of the Act. That subsection requires:

1(b)..... the document or information must only be disclosed to the Tribunal.

28. The certificate, found at page 146 of the Court Book, actually says:

... the AAT must do all that is necessary to ensure that the document or information is not disclosed to any person other than to a member of the AAT...

29. There is no difference in those words. They connote exactly the same meaning. There is no legislative requirement that the certificate use a particular form of words.

30. The submissions made by the Applicant on this point have been further demonstrated to be disingenuous because of the submissions made in relation to grounds 2 and 3 of which I will speak later. When making submissions as to whether a letter sent to the Applicant by the Tribunal was, in fact, sent pursuant to s.359 of the Act, the Applicant submitted that there was no need to send a letter in the precise terms of the actual section or legislation.

31. Quite sensibly, the Applicant did not seek to make oral submissions on this first ground even though the Applicant did not specifically abandon it.

32. There is no jurisdictional error illustrated in ground 1 and it therefore fails.

33. Ground 2 is that:

2. *The Tribunal failed to have regard to relevant information, failed to provide procedural fairness to the Applicant and/or constructively failed to exercise its statutory review obligation by failing to consider the Applicant's claim that the father of the Applicant's child (**Father** and **Child**) would not facilitate the relationship between the Applicant and the Child, and the Applicant would not be in a position to enforce her right to parental responsibility for the Child if the Applicant was not present in Australia, thereby falling into jurisdictional error.*

34. Ground 3 is that:

3. *The Tribunal failed to have regard to relevant information, failed to provide procedural fairness to the Applicant and/or constructively failed to exercise its statutory review obligation by failing to consider the Applicant's claim that the Father had exposed the Child to harm and risk, and that there was an ongoing risk of harm to the Child by the Father, thereby falling into jurisdictional error.*

35. The background to these two grounds is found at Court Book, page 180, in a letter sent by the Tribunal to the Applicant. The first page of the letter asked for the Applicant to comment on information given to the Tribunal by the father of the child. It can be assumed that that letter or the first page of the letter is sent pursuant to s.359A of the Act.

36. The second page of the letter invites the Applicant to provide information in writing by saying that the Tribunal will have regard to the following considerations. The Tribunal invited the Applicant to provide any information considered relevant in relation to each of these. The Tribunal then listed the nine considerations in Reg.2.41 of the Regulations as well as the other four policy considerations that I have previously referred to.

37. At Court Book, page 223, the Applicant provided a statement which contained her version of events which was submitted was sent in response to the letter that is at Court Book, page 180. In that statement the Applicant said that Mr Walker was not complying with the current Court orders and that he had taken the child for five days a week for three weeks and told the Applicant that he will come and get her if he is not working. The Applicant noted that she had contacted Legal Aid for advice about this issue.

38. Further, in the statement, the Applicant said that, since her visa was cancelled, Mr Walker and his partner have said that they can help her if she agrees with them about contact with the child. She said that Mr Walker says that his present partner is better for the child than the Applicant herself. She said that Mr Walker constantly asked her about her visa and says that he will take care of the child full time in Australia. She said that Mr Walker told her that if she goes back to Thailand that they will help her come back. She says that she believes that Mr Walker and his partner are trying to control her and get her to leave Australia so that Mr Walker can have the child full time and not have to pay her child support which is \$650.00 a month.
39. She said that she believes Mr Walker wants her to be kicked out of Australia and for the child to live with him full time. She said that if she were in Thailand she does not believe that Mr Walker will comply with any Court orders they have for shared care between them. She said that she worries that if her visa remains cancelled that Mr Walker could take the child to Scotland, and if the Applicant is in Thailand, she does not believe she would have the power or money to pay a lawyer to fix this. She says that she does not believe that she will be able to get Mr Walker to return the child to her.
40. The Applicant also gave the Tribunal her affidavit in the parenting application. In that affidavit, the Applicant outlined the harm that she said had been perpetrated, and had the potential to be further perpetrated, upon her.
41. In this hearing, the Applicant contends that, by giving the Tribunal this information, she was making a claim that:
- a. Mr Walker would not facilitate the relationship between her and the child if she were to go to Thailand without the child, and she would not be in a position to enforce the current orders if that occurred; and
 - b. Mr Walker had in the past exposed the child to harm and risk and that there was therefore an ongoing risk of harm to the child by Mr Walker if the child were not to live with the Applicant.

42. The Applicant contends that, having raised these claims, it was incumbent upon the Tribunal to consider them. The Applicant contends that these claims come under the request for information covered by “*the present circumstances of the visa holder*” and “*any other relevant matters, including the degree of hardship that may be caused to the visa holder and any family members.*” I have my doubts that this information correctly fits under those categories, but is more general information that goes to what is in the best interests of the child. Be that as it may, that does not make any particular difference to this matter.
43. The Applicant contends that the letter at Court Book, page 180, is a letter pursuant to s.359 of the Act. Relevantly, s.359 of the Act reads as follows:
- (1) In conducting the review, the Tribunal may get any information that it considers relevant. However, if the Tribunal gets such information, the Tribunal must have regard to that information in making the decision on the review.*
44. The contention is that because this information given by the Applicant was given pursuant s.359 of the Act, unless the Tribunal has regard to that information, it will have committed a jurisdictional error. I do have some doubt that the letter sent is a request for information pursuant to s.359 of the Act, but in the circumstances will proceed as if it were such a request.
45. On my reading of the reasons of the Tribunal, the Tribunal has not specifically engaged with either of those two claims. However, both of those claims really fit within the ambit of the best interests of the child.
46. As I have pointed out by reading large sections of that submission that was made, the Applicant has complained of a good many matters which really, one would think, are usually the province of the Family Law Courts. The Tribunal has acknowledged that the best interests of the child are that both parents reside in the same country.
47. If both parents reside in the same country, then that is the answer to the claims; not only the two that the Applicant has identified, but really all of the claims that she has made in the response she has given to the Tribunal, and what is contained in her affidavit in the parenting matter.

I note that the affidavit in the parenting matter raised concerns, and those concerns were addressed by the orders that the Applicant entered into by consent.

48. It seems to me that there is no need for the Tribunal to go through and identify each specific claim that may have been made out of the material that was put to it, if it has identified what remedy would be able to answer such a claim. In this case, every claim that the Applicant made was able to be answered by the acknowledgement that the best interests of the child were for both parents to be living in the same country. This is why, at paragraph 46, the Tribunal says “*The applicant has not raised any other matters for consideration*”.
49. Having come to that conclusion the Tribunal says at paragraph 49 that it had “*formed the view that the best interests of the child would not be adversely affected by the cancellation*”. This is a view that was open on the evidence before the Tribunal. It seems to me that there is no jurisdictional error.
50. However, the Tribunal did go further, as I have already mentioned. I have to talk about this because the Minister has raised the issue of materiality. The remainder of paragraph 49 shows that even if the best interests of the child would be adversely affected by the cancellation, the Tribunal considers that those considerations are outweighed by the gravamen of the breach of s.104 of the Act.
51. Therefore, it is clear that even if the Tribunal had made an error, it is not an error which could have realistically affected the final decision. Accordingly, grounds 2 and 3 also fail.
52. I dismiss the application with costs in the sum of \$7,467.00.

I certify that the preceding fifty-two (52) paragraphs are a true copy of the reasons for judgment of Judge Vasta

Date: 16 March 2020